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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 JEFFREY D. ROBERTSON, an
11 individual,
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13 vs. Plaintiff,
14 UNITED STATES OF AMERICA,
15 Defendant.

CASE NO. 13cv2425-GPC(RBB)

**NOTICE OF TENTATIVE RULING
ON DEFENDANT'S MOTION TO
DISMISS, AND MOTION FOR
SUMMARY JUDGMENT**

16 Before the Court is Defendant's motion to dismiss and motion for summary
17 judgment. (Dkt. No. 27.) A hearing is set for May 15, 2015. After a review of the
18 briefs, supporting documentation and the applicable law, the Court issues the following
19 tentative rulings in advance of Friday's hearing.

20 Plaintiff filed an amended complaint alleging negligence against Defendant
21 under the Federal Tort Claims Act ("FTCA"). Defendant moves to dismiss the
22 amended complaint for lack of subject matter jurisdiction pursuant to Federal Rule of
23 Civil Procedure 12(b)(1) arguing that the failure to maintain the wire fence along Bear
24 Valley Road ("BVR") located in the Cleveland National Forest falls under the
25 discretionary function exception to the FTCA. Defendant also moves for summary
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1 judgment arguing that California’s recreational use immunity bars Plaintiff’s claims.¹
 2 Plaintiff opposes.

3 Discussion

4 The Court tentatively DENIES Defendant’s motion to dismiss based on the
 5 discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

6 While Defendant has demonstrated the first factor, that Defendant’s decision with
 7 respect to the maintenance of BVR involves an “element of judgment or choice,” it has
 8 failed to demonstrate the second factor, that the government’s decision was based on
 9 policy decisions grounded in economic, social or political policy. Since the
 10 government did not consider the wire fence on BVR as part of its maintenance
 11 decision, it cannot be said to have engaged in any policy considerations concerning the
 12 wire fence. Therefore, maintenance of the wire fence on BVR falls outside the purview
 13 of the discretionary function exception.

14 The Court tentatively GRANTS Defendant’s motion for summary judgment
 15 based on California’s recreational use immunity pursuant to California Civil Code
 16 section 846. Plaintiff’s allegation, without evidentiary support, that the forestry
 17 workers somehow clipped a section of wire fencing at or near the scene of Plaintiff’s
 18 accident and somehow caused the rolled wire fence to end up in the middle of BVR is
 19 speculation and is not “specific,” “substantial” or “significantly probative.” See
 20 Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1029 (9th Cir. 2006) (while
 21 circumstantial evidence may be used to create a genuine issue of material fact, the
 22 evidence must be “specific” and “substantial”); Anderson, 477 U.S. at 249-50 (a
 23 motion for summary judgment may be granted if the evidence is “merely colorable” or
 24 “is not significantly probative.”).

25 In addition, Plaintiff has not demonstrated a genuine issue of fact that the
 26 government had actual or constructive knowledge of the dangers of the wire fence, had

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 28 ¹Defendant also moves for summary judgment arguing that Plaintiff has failed to demonstrate causation. Since the Court tentatively rules that Defendant’s motion for summary judgment should be granted, it will not address the causation argument.

1 actual or constructive knowledge that injury is probable, and consciously failed to act
2 to avoid the peril. See Termini v. United States, 963 F.2d 1264, 1267 (9th Cir. 1992)

3 Counsel are advised that the Court's rulings are tentative and the Court will
4 entertain additional arguments at the hearing on May 15, 2015 at 1:30 p.m. in
5 Courtroom 2D.

6 IT IS SO ORDERED.

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8 DATED: May 14, 2015

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11 HON. GONZALO P. CURIEL
12 United States District Judge
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